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In The

Supreme Court of the United States

October Term, 1994

LEONARD J. KIRSCHNER, in his capacity as Director of Arizona Health Care Cost Containment System, THE STATE OF ARIZONA,

Petitioners,

vs.

ELIZABETH SALGADO; PIMA COUNTY, ARIZONA, a body politic,

Respondents.

Petition For Writ Of Certiorari To The Arizona Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Arizona Supreme Court correctly found that an Arizona statute which allowed liver transplants for persons under age 18 (21) but excluded persons age 18 (21) or older violated the "similarly situated" requirements and the reasonableness tests of federal Medicaid law.

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STATUTES AND REGULATIONS INVOLVED

In addition to those listed by Petitioners, Respondents believe the following, which are reprinted in the Appendix herein, should be included:

FEDERAL STATUTES

42 U.S.C. § 1396a(a)(10)(A)(i)(I-VII)

42 U.S.C. § 1396a(a)(10)(B)

FEDERAL REGULATIONS
42 C.F.R. § 440.240

STATE STATUTES
A.R.S. § 36-2901(4)(b)
A.R.S. § 36-2907(E)

STATEMENT OF THE CASE

Petitioner's statement of the case properly sets forth the history of the case but fails to set forth all of the facts pertinent to the decision. Therefore, Respondents will do so. The record of this case will reflect that the Arizona version of Medicaid known as AHCCCS since its beginning in 1982 through 1987, had covered and paid for liver transplants for three adults, two of which were categorically eligible and one who was medically indigent or medically needy. Sharon Brierley and Barbara Brillo of Tucson were the two categorically eligible recipients.

Prior to October 1982, AHCCCS regulations provided that organ transplants were covered unless the transplant was deemed to be experimental by the director of AHCCCS. On October 1, 1985 AHCCCS created a written policy which denied liver transplant coverage for persons age 18 years or older. The "policy" was backed up by administrative regulations which excluded adult liver transplants because they were deemed to be experimental. However, AHCCCS never provided coverage for anyone under age 18 as a result of the regulations.

Barbara Brillo had to bring suit to force AHCCCS to authorize her transplant because of the AHCCCS policy

of providing liver transplant coverage to only those persons who had not attained the age of 18 years. Judge Richard Hannah of the Pima County Superior Court ruled that the regulation and policy were arbitrary and capricious and violated equal protection. Barbara Brillo then became the third adult to be transplanted under AHCCCS.

In 1987 the AHCCCS officials, through their influence with the legislative committees, convinced the legislature to enact a statute that banned all liver transplants.[1] During the very next legislative session, a highly publicized case involving an infant in need of a liver transplant occurred in Maricopa County[2] and the legislature enacted the statute which was the object of the *Salgado* litigation.[3] There were no medical or scientific standards that would justify transplanting a person not yet age 18 and not transplanting a person age 18 or older.[4] During the same year that the offending statute was enacted, adult liver transplants were a covered medical service under Medicaid in 42 other states.

Elizabeth Salgado at the time she applied for coverage of her transplant was 44 years of age. She was enrolled in AHCCCS and considered eligible as a categorically needy individual. The only effective, acceptable

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[1] The next legislative session after the Brillo case.

[2] Excerpts from Minutes, Arizona Legislative Committee on Health and Welfare, May 10, 19, 1988. See Appendix 1-4.

[3] A.R.S. § 36-2907(A)(12).

[4] From the enactment of A.R.S. § 36-2907(A)(12) in 1988 through December 4, 1991, only one liver transplant was covered for a person not yet age 18.

and proven medical therapy for Elizabeth Salgado's disease was transplantation of another liver. Mrs. Salgado's disease, primary biliary cirrhosis, almost exclusively occurs in young to middle aged women and the survival rate after transplant for this group is far superior to that of persons suffering from other chronic liver diseases. Mrs. Salgado's liver transplant was medically necessary and AHCCCS considered Elizabeth Salgado's liver transplant to be medically appropriate and not experimental.

At the time AHCCCS denied Mrs. Salgado's transplant, it would provide and pay for medical treatment of someone who was dying as a result of their health deteriorating from liver disease and would pay for medical care after a liver transplant, but it would not pay for the transplant itself.[5] Most other organ transplants are allowed and covered under the Arizona statutes, without distinction or limitation as to the age of the needy recipient.[6]

ARGUMENT FOR DENIAL OF PETITION

This Court should not issue its writ to review this case because there was no significant federal question

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[5] Although Petitioners have argued many times that the high costs of transplants is the primary reason for not covering them. The cost of intensive care for those needing but not eligible for transplants can be as much as the transplant itself. As a matter of fact, the transplant cost in this case was only $102,000.00, far less than Petitioners' claim of $200,000.00 to $300,000.00 for each transplant.

[6] A.R.S. § 36-2907(A)(12) and (E).

which was decided differently than the existing federal precedents allow. Moreover, there is no conflict between the judgment in the *Salgado* case and any decision of any United States court of appeals.

I. THE *SALGADO* CASE WAS CORRECTLY DECIDED ON THE WELL ESTABLISHED LAW THAT ONCE A STATE ELECTS TO PARTICIPATE IN MEDICAID, IT MUST DO SO IN A MANNER THAT COMPLIES WITH ALL OF THE REQUIREMENTS OF TITLE XIX OF THE SOCIAL SECURITY ACT AND THE EQUALLY WELL ESTABLISHED ADJUNCT THAT ONCE A STATE CHOOSES TO FUND TRANSPLANTS, IT MAY NOT ARBITRARILY OR UNREASONABLY DENY A TRANSPLANT TO A PERSON OTHERWISE ELIGIBLE FOR MEDICAID.

When a state as Arizona did here moves into the arena of defining a specific policy to cover a specific category of transplants, it must comply with the well established Medicaid laws and legal precedents by doing so in a way that does not arbitrarily or unreasonably deny services to other persons who are eligible Medicaid recipients.

As the court said in *Salgado.* "It is reasonable to expand service categories for age-appropriate care to young persons. But it is unreasonable to allocate treatment within a service category solely on the basis of age." *Salgado v. Kirschner,* 878 P.2d 659, 664 (Az. 1994). The unreasonableness of an age limitation for one category of services becomes even more apparent when one realizes Arizona did not impose any age restriction on kidney

transplants, cornea transplants, bone transplants or heart transplants.[7]

The *Salgado* judgment has nothing to do with the EPSDT issues because Arizona had already determined to provide liver transplants to both those age 18 and older and those younger than age 18. Arizona had authorized three adult liver transplants prior to the application of EPSDT. By having done so, Arizona exercised its discretion of whether or not to provide liver transplants in favor of providing them. This brought Arizona squarely within 42 U.S.C. § 1396b(i)(1) provisions. Arizona then changed its mind and tried to find ways to justify limiting coverage. It seized upon the EPSDT program but it was simply too late. Arizona had already brought itself within the clearly stated parameters of the past decisions of this Court and the Circuits and had exercised its § 1396b(i)(1) discretion.

Those parameters are once a state chooses to participate in Medicaid, it must comply with the requirement of Title XIX.[8]

The requirements of Title XIX as to transplants is essentially two fold. The first is described as follows:

> States may elect which, if any, organ transplants to cover. *Id.* However, once a state has adopted a policy to cover a category of organ

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[7] A.R.S. § 36-2907. Since the 1988 statute, both autologous and allogeneic bone marrow transplants have been added to the list without any age limit.

[8] *Harris v. McRae*, 448 U.S. 297, 301, 100 S.Ct. 2671, 2680, 65 L.Ed.2d 784 (1980); *Alexander v. Choate*, 469 U.S. 287, 289 n.1, 105 S.Ct. 712, 714 n.1, 83 L.Ed.2d 661 (1985).

> transplants, it may not arbitrarily or unreasonably deny services to an otherwise eligible Medicaid recipient.

Meusberger v. Palmer, 900 F.2d 1280, 1282-83 (8th Cir. 1990).[9]

The second is that similarly situated persons must be treated alike. The source of both of the foregoing is 42 U.S.C. § 1396b(i)(1) which in pertinent part states:

> Payment under the preceding provisions of this section shall not be made –
>
> (1) for organ transplant procedures unless the State plan provides for written standards respecting the coverage of such procedures and unless such standards provide that –
>
> (A) similarly situated individuals are treated alike; and . . .

A House Report clarified what Congress meant by both similarly situated and by written standards.[10]

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[9] To the same effect, *Dexter v. Kirschner,* 984 F.2d 979, 984 (9th Cir. 1992). Also, in *Montoya v. Johnston,* 654 F.Supp. 511, 514 (W.D. Tex. 1987), the court in ordering the coverage of a liver transplant, stated:

> Likewise, in the present case, Texas voluntarily entered the federal Medicaid cooperative program and voluntarily recognized liver transplants as a covered service under Medicaid. Accordingly, Texas must comply with the federal standards which prohibit the arbitrary and/or unreasonable denial of services to otherwise eligible recipients.

[10] House Report No. 100-391(I) page 532, see Appendix 5.

The "similarly situated" provision has been defined by the 9th Circuit in a manner that is directly applicable to the *Salgado* case. In *Dexter,* the court said:

> We conclude that "similarly situated" means all patients who can be treated effectively by the same organ transplant procedure.

The *Dexter* court removed any doubt as to what it meant, by this:

> For example, some cancer patients may benefit from a liver transplant, funded by AHCCCS, while other may require a pancreas transplant, not funded by AHCCCS. These cancer patients are not similarly situated; they need different transplants.[11]

The § 1396b(i)(1) requirement for "standards" protects against the potential for arbitrary or unreasonable denials to otherwise eligible persons. This requirement joins with other requirements to Title XIX, such as the *amount, duration,* and *scope,* must be the same for all categorically needy persons and the requirement that such persons shall not be denied the foregoing solely on the basis of their *diagnosis, type of illness* or *condition.* These combined requirements form the reasonableness

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[11] *Dexter,* 984 F.2d at 986, the *Dexter* definition follows precisely the guidance given by Congress in House Report No. 100-391(1) at page 532, where it was stated, *"For example, if a State covers liver transplants for patients with one medical condition but not for patients with another, and if a liver transplant is medically indicated and not experimental with respect to each condition, the State's plan would be out of compliance with the amount, duration and scope requirement."* (Emphasis supplied)

standard which the *Salgado* court also found to be violated by the offending statute.

The protections built into Title XIX sometimes are difficult to separate when analyzing transplant decisions. The *Todd v. Sorrell* case is an example.[12] In *Todd*, the court found that standards were being too strictly applied and found that the transplant recipient there had substantially complied with the standards. In so doing, the court held:

> We conclude that Michelle, as a patient *similarly situated* to one with extrahepatic biliary atresia, was in substantial compliance with Virginia's liver transplant criteria, and hence was eligible for state funding for her transplant operation and likely to succeed on appeal. (Emphasis supplied)

Unreasonable standards have been struck down by a Michigan district court. In *Allen v. Mansour*, 681 F.Supp. 1232, 1239 (E.D. Mich. 1986), the court struck down Michigan's "standards" which precluded liver transplants for adult alcoholics who had not abstained from alcohol for at least two years. The court found that the criteria for providing Medicaid funded liver transplants was based on anecdotal rather than scientific evidence.

Another district court has described how the *amount*, *duration*, and *scope* requirements operate in relation to the categorically needy.

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[12] *Todd by Todd v. Sorrell*, 841 F.2d 87, 90 (4th Cir. 1988)

In *Coe v. Hooker,* 406 F.Supp. 1072, 1083 (N.H. 1976), the court stated the principles also found in 42 C.F.R. §§ 440.230 and 440.240 as follows:

> A major limitation on the states in the administration of their Medicaid programs is Title XIX's equality requirement. A state is required to provide medical assistance to all of the "categorically needy" as defined in Section 1396a(a)(10)(A). They are further mandated to provide:
>
> > that the medical assistance made available to any individual described in clause (A) –
> >
> > > (i) shall not be less in amount, duration or scope than the medical assistance made available to any other such individual, . . . 42 U.S.C. § 1396a(10)(B)(i).
>
> By this provision, Congress has statutorily guaranteed Medicaid recipients equal treatment by state Medicaid administrators.[13]

It is against this backdrop of federal statutes, decisional law and expressions of congressional intent that the Arizona Supreme Court rendered and based its decision in *Salgado.*

Once Arizona decided to authorize liver transplants, which it did even before enacting the offending statute, it had to do so in a manner that would treat similarly

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[13] The failure to comply with the equal amount, duration and scope requirement is the basis for the holdings in the following cases granting liver transplant coverage. *Allen v. Mansour,* supra; *Ellis v. Patterson,* 859, F.2d 52 (8th Cir. 1988); *Lee v. Paige,* No. 86-1081-CIV-J-14 (M.D.Fla. 12/19/1988); *Montoya v. Johnston,* supra; *Todd by Todd v. Sorrell,* supra.

situated persons the same and meet the reasonableness requirements evidenced by sufficient standards and by complying with the amount, duration and scope requirements.

The statute in question had no standards for determining who should be eligible,[14] it did not allow similarly situated individuals to be treated the same[15] and it did not provide for allowing services to a categorically needy person that were reasonable in amount, duration and scope.[16] That is why the Arizona court ruled as it did and this is why this Court should not disturb that judgment.

II. IN REACHING THE JUDGMENT IN *SALGADO* IT WAS NOT NECESSARY TO DECIDE WHETHER A STATE CAN PROVIDE TRANSPLANTS VIA THE EPSDT STATUTES WITHOUT ALSO PROVIDING COVERAGE TO CATEGORICALLY ELIGIBLE PERSONS NOT QUALIFIED FOR EPSDT.

The judgment in this case which was mandated by the Arizona Supreme Court required that Elizabeth Salgado be covered by Respondents for a liver transplant and that the Respondents reimburse the expense of the

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[14] Thus it violated *Meusberger,* supra, *Todd,* supra, and § 1396b(i)(1).

[15] Thus it violated *Dexter,* supra, *Todd,* supra, and § 1396b(i)(1).

[16] Thus it violated all of those cases cited at footnote 13.

transplant. The judgment does not rest upon any interpretation of the EPSDT program.[17] The opinion addresses the arguments raised by the Respondents regarding the EPSDT provisions and case law, but neither the opinion nor the judgment are based on any relationship to the EPSDT issues raised by the Respondents. The EPSDT issue was just one of the many arguments that Respondents utilized to attempt to convince the Arizona Court to uphold the validity of the Arizona statute precluding liver transplants to persons age 18 or older.

The *Pittman*[18] case cited by Petitioners, and possibly the *Pereira*[19] case, clearly stand for the proposition that 42 U.S.C. § 1396d(r)(5) makes transplant coverage mandatory for persons under age 21. Neither *Pittman* nor *Pereira* (in this context) are relevant to the *Salgado* case because they were both decided on the basis that § 1396d(r)(5) mandated coverage in those cases.[20] § 1396d(r)(5) was not

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[17] This Court has commented many times that reviews by certiorari are of judgments rendered below, not of the opinions of the courts that are the objects of the writ. *Chevron USA Inc. v. Natural Resources Defense*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984); *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 625 n.11, 106 S.Ct. 2101, 2111 n.11, 90 L.Ed.2d 548 (1986).

[18] *Pittman v. Secretary Fla. Dept. of Health & Rehabilitation Servs.*, 998 F.2d 887 (11th Cir. 1993), *cert. denied*, 114 S.Ct. 650, 126 L.Ed.2d 608. 62 U.S.L.W. 3409 (U.S. 1993).

[19] *Pereira v. Kozlowski*, 996 F.2d 723 (4th Cir. 1993).

[20] Petitioners also cite *McLaughlin v. Williams*, 801 F. Supp. 633 (S.D. Fla. 1992), and *Miller v. Whitburn*, 10 F.3d 1315 (7th Cir. 1993) as cases that stand for mandating coverage under § 1396d(r)(5). However, neither case so held. Both cases dealt with claims by the states that the transplants in question were experimental.

added to the Medicaid statutes until 1989. The statute, (A.R.S. § 36-2907(A)(12)), that the Arizona Supreme Court determined to be in violation of the similarly situated and reasonableness standards of the federal Medicaid statutes, was enacted in 1988, before § 1396d(r)(5) ever came into existence.[21] As a result, it was not necessary to even consider those cases to arrive at the *Salgado* decision.

Arizona legislators did not base the decision to pass A.R.S. § 36-2907(A)(12) to comply with EPSDT requirements. They restricted the Arizona statute because after years of covering and then not covering transplants, they were faced with an infant that could die in nine months if they did not.[22]

The statute at issue limited the transplants only to livers and no other organ. A careful reading of the statute reveals that the grant of liver transplants to those under age 18 was qualified by the use of the term " . . . *allowed* as an early and periodic health screening and diagnosis and treatment service for children . . . " (Emphasis supplied)[23]

The statute was further qualified by requiring: "If federal financial participation is available . . . " Obviously

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[21] It should be noted the *Salgado* decision refers to § 36-2907(A)(11), but the version which was in effect at the time of the denial of a transplant was § 36-2907(A)(12).

[22] The minutes of the legislative committee reflect that on May 10, 1988, the committee discussed the imminent death of a 3 year old unless the child received a liver transplant. A little over one week later on May 19, 1988 the committee voted to add persons under age 18 back to the coverage for liver transplants by enacting A.R.S. § 36-2907(A)(12). (See Appendix 1-4)

[23] A.R.S. § 36-2907(A)(12).

the Arizona Legislature did not think they were mandated to provide liver transplants by the EPSDT program when they enacted § 36-2907(A)(12) as the Petitioners now argue.

If Arizona truly felt that it is mandatory to provide transplants to persons under age 18 it could have done so without passing a statute. It could have simply deemed that childrens' transplants are mandated by EPSDT and included as a part of the inpatient services.[24]

Most states now cover transplants of all types without age qualifications. As a result there is no reason for this Court to interrupt the normal development of precedents in the lower courts that are evolving. There simply is slight likelihood that the question of whether a state, if mandated to fund EPSDT transplants, can be forced to also fund non-EPSDT mandated transplants will need to be answered.

The EPSDT requirements contained in § 1396d(r)(5) may very well mandate transplants for children if such are needed to ameliorate defects or chronic conditions. However, this does not mean that a state can be justified without medical or scientific basis to enact a statute that only addresses one category of transplants and then does so in a way that is different from all other categories of transplants the state included in its statutes.

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[24] As a matter of fact, Respondents in their supplemental brief before the Arizona Supreme Court stated "In retrospect, it appears the legislature may not have needed to mention liver transplants at all in the statute . . . " Appellees' Supplemental Brief on Federal Statutory Issue, page 7 (June 6, 1994).

There was no requirement contained in the federal statutes or regulations in 1988 nor is there now, that Arizona enact a statute to cover transplants for children. Clearly the EPSDT cases cited have no bearing on the outcome of the *Salgado* judgment.

III. THE *SALGADO* JUDGMENT DOES NOT CONFLICT WITH ANY FEDERAL DECISIONS. TO THE CONTRARY, IT IS CONSONANT WITH FEDERAL DECISIONS.

As previously discussed, the Eleventh Circuit case of *Pittman* and to a lesser extent the Fourth Circuit case of *Pereira* conclude that § 1396d(r)(5) mandate medically necessary transplants for EPSDT eligible persons. These holdings do not conflict with *Salgado*. The Arizona court did not render a judgment declaring the foregoing cases to be in conflict with its judgment. This is so because whether EPSDT mandates transplants simply has nothing to do with what occurred in *Salgado*.

However, another aspect of the EPSDT cases that could be an independent ground for supporting the *Salgado* decision is that coverage of transplants for special classes of Medicaid recipients must be provided if "medically necessary".

A categorically needy person is in a special class as are those who are benefited by the EPSDT provision.[25] Elizabeth Salgado was a member of one of those classes which fall into the mandated medical services category.

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[25] See, 42 U.S.C. § 1396a(a)(10)(A)(i)(I-VII), in Appendix 8, and compare to A.R.S. § 36-2901(4)(b) in Appendix 7.

In, *Miller by Miller v. Whitburn*, 10 F.3d 1315 (7th Cir. 1993), the court did not involve itself in deciding if the EPSDT program made transplants mandatory because the state failed to raise the issue. Instead, the *Miller* court agreed with the Plaintiffs' counsel that a Medicaid recipient may challenge the reasonableness of a state's decision regarding medical necessity.[26]

Similarly, in *McLaughlin v. Williams*, 801 F.Supp. 633, 637 (S.D. Fla. 1992), in evaluating whether a preliminary injunction should issue, the *McLaughlin* court stated:

> Relying on this language from Beal, various lower courts have held that a state plan must fund the mandatory services enumerated in § 1396d(a) whenever they are found to be "medically necessary." See, e.g., Pinneke, 623 F.2d at 548 n.2; Montoya v. Johnston, 654 F.Supp. 511, 512-13 (W.D. Tex. 1987); Lee v. Page, No. 86-1081-CIV-J-14 (M.D. Fla. Dec. 19, 1986).

The *Pinneke* case cited in *McLaughlin* was revisited in *Weaver v. Reagen*, 886 F.2d 194, 199 (8th Cir. 1989). The court in following its precedent quoted the holding in *Pinneke v. Preisser*, 623 F.2d 546 (8th Cir. 1980), as follows:

> A state plan absolutely excluding the only available treatment . . . for a particular condition must be considered an arbitrary denial of benefits based solely on the 'diagnosis, type of illness, or condition.'

The EPSDT cases come full circle when *Pereira* is revisited. In that case the court recognized the seven

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[26] *Miller*, at 1318.

favored areas of coverage to which the categorically eligible belong, by stating:

> Although not required to participate in Medicaid, once a state elects to do so, its plan must comport with federal requirements. Among these requirements is the provision of at least seven types of services. See *id.* § 1396a(a)(10)(A). The Commonwealth concedes that absent exception in the Act, Pereira's heart transplant would be covered as one of those services.

Pereira by Pereira v. Kozlowski, supra at 724.

The common thread in *Miller, McLaughlin, Pereira* and *Pinneke* is that in the favored categories of persons covered as in the categorically needy and those eligible for EPSDT, a state may not arbitrarily refuse to provide the only medically necessary treatment available.

This is part of the reasonableness test that is built into Title XIX and the State of Arizona failed this test as well because it had no reasonable basis for withholding services.

CONCLUSION

The *Salgado* case was decided correctly by the Arizona Supreme Court applying the federal statutes and judicial precedent. No new ground was broken by the Arizona court and no conflicts with federal appellate courts have occurred.

Contrary to what Petitioners allege, the Arizona court has not ruled that transplants are or are not mandatory for persons eligible for EPSDT coverage.

If this Court is inclined to involve itself in the issue of whether the EPSDT program mandates transplants for persons not yet 18 or 21, this case is definitely not the appropriate vehicle. The discussion of the EPSDT program by the Arizona Supreme Court was not necessary to the decision because Arizona had a history of providing liver transplants to persons over age 18 prior to its passing a statute precluding transplants to those age 18 or older.

Petitioners are attempting to utilize the fabric of the EPSDT program to make it appear as if there is really an issue in this case that would rise to a magnitude that this Court would deem to be of national importance. Petitioners do so by the way they phrase what they consider the questions should be. However, rephrase the questions as the issues were actually decided below, and it becomes clear the Petitioners are using smoke and mirrors. The question should be:

> Whether the Arizona Supreme Court correctly found that an Arizona statute which allowed liver transplants for persons under age 18 (21)

but excluded persons age 18 (21) or older violated the "similarly situated" requirements and the reasonableness tests of federal Medicaid law.

The answer is: Yes, the judgment is correct. It is respectfully requested that this Court decline to issue its writ of certiorari in this matter.

Respectfully submitted,

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Mr. Wilcox said this issue is brought up now because there is a 3-year-old waiting for a liver transplant who has been given about 9 more months to live. He said he knows it is the intent to have children on AHCCCS. Mr. Wilcox said he hoped the committee would look into the issue comprehensively. When this bill goes back to the House, Mr. Wilcox said he would make his presentation there.

Senator Walker asked if Mr. Wilcox was proposing a study committee. He replied he was. He wants the committee to deal with liver transplants for those in the AHCCCS program.

Senator Walker asked if Mr. Wilcox had an amendment to benefit the child in need right now of the transplant. Mr. Wilcox said he did not because in talking with colleagues in the House and Senate, he did not want to waste the time of the people who would put their time into the amendment because the dollars are not here. An amendment could be drawn up, however, he said he did want to be realistic about the revenue problem of the state. Last year there was a lady in Yuma who died because there was no authorization that could be gotten to go ahead with a liver transplant for her.

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MINUTES OF COMMITTEE ON HEALTH
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Senator Lunn explained the next amendments on transplants, noting that #7a and #7b are in conflict with each other and only one can pass:

#7a – 12-line amendment dated 5/18/88, 2:31 p.m. on service coverage for all eligible persons

#7b – 12-line amendment dated 5/18/88, 2:33 p.m. on service coverage for children under 18 and for only liver transplant

#7c – 2-page amendment dated 5/18/88, 11:32 a.m. on study committee.

Senator Pena moved amendment #7a. He explained this amendment explains current AHCCCS coverage to include transplants of liver, pancreas and bone marrow, plus immunosuppressant medications for these transplants, to all categories of eligible clients. It is contingent on federal funds being made available to the state. Senator Pena said there are a varying number of other states which cover each of these various medical treatments.

Senator Lunn stated that last year heart transplants were included in the AHCCCS bill.

Senator Walker moved amendment #7b. She said this was being offered as a substitute for #7a. It covers liver transplants and immunosuppressant medications for children under the age of 18, if federal participation is available under Title XIX. Senator Walker said she did not oppose

Senator Pena's amendment, but while she understood there may be some age discrimination in her bill, she thought at this particular time the Committee should at least offer this service for children.

Senator Pena said he had no opposition to Senator Walker's amendment, but there are three children and two adults presently waiting for liver transplants. He felt it would not be a prohibitive cost to the state. If AHCCCS was to allow transplants for liver, it should include bone marrow and pancreas transplants, too, and not limit these services to just children.

Senator Walker said she had another amendment, #7c, to study bone marrow and pancreas transplants. She said she would like to see her amendment adopted for children and if the study shows a need for additional transplants, she certainly would support such an amendment next year.

Dr. Kirschner said AHCCCS' main goals are to help:

* children under 18, who were covered until last August
* pregnant women

He said the agency supported liver transplants under #7b. A study might be reasonable and it would give AHCCCS some idea of what the cost might be.

Senator Wright asked how much liver transplants would cost the state. Dr. Kirschner replied a liver transplant, plus a year of treatment, would be about $200,000. There

is a rare kind of liver disease which affects young children and they need on-going treatment the rest of their lives. There is a DES client, who is also an AHCCCS client, who would fall under that group with the rare disease right now.

Senator Wright asked if AHCCCS negotiated contracts for transplant surgeries, and were they confined to Arizona or were they going into other states. Dr. Kirschner said AHCCCS had contracted out certain surgeries and had gone to several out-of-state hospitals.

Senator Pena said he recognized the need for Senator Walker's amendment and his own. However, he did not want to jeopardize passage, so he would support amendment #7b, and Senator Pena withdrew his amendment #7a.

Amendment #7b was passed by voice vote.

Senator Walker moved amendment #7c on behalf of Representative Wilcox and it passed by voice vote.

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LEGISLATIVE HISTORY

HOUSE REPORT NO. 100-391(I)
PP-2313-351, 2313-352

* * *

(d) Organ transplant technical – Under current law, States must offer certain "mandatory" services, such as inpatient hospital and physicians' services, each of which must be sufficient in amount, duration, and scope to reasonably achieve its purpose. States may not arbitrarily deny or reduce the amount, duration, or scope of a mandatory service solely because of an individual's diagnosis, type of illness, or condition. To assure that State coverage decisions for organ transplants are based on clear principles consistently applied, and not on political or media considerations, section 9507 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), P.L. 99-272, requires that a State which covers organ transplant procedures set forth under its Medicaid plan written standards respecting the coverage of such procedures. Under these standards, similarly situated individuals must be treated alike.

The Committee wishes to clarify that the organ transplant procedures which a State covers, and the hospital, physician, and other services these procedures entail, must be sufficient in amount, duration, and scope to reasonably achieve their purpose. For example, if a State covers liver transplants for patients with one medical condition but not for patients with another, and if a liver transplant is medically indicated and not experimental with respect to each condition, the State's plan would be out of compliance with the amount, duration, and scope

HOUSE REPORT NO. 100-391(I)
(Continued)

requirement. The Committee amendment would clarify that the current law requirements for written standards respecting organ transplant procedures must not be construed by HCFA or the States to permit States to provide services that are not reasonable in amount, duration, and scope to achieve their purpose. The amendment is effective as if included in section 9507 of COBRA.

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A.R.S. § 36-2901(4)(b)

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4. "Eligible person" means any person who is:

(b) Defined as mandatorily eligible pursuant to title XIX of the social security act (P.L. 89-97; 79 Stat. 344; 42 United States Code section 1396a (1980) or, beginning October 1, 1986, under the age of eighteen years and defined as optionally eligible pursuant to title XIX of the social security act (P.L. 89-97; Stat. 344; 42 United States Code sections 1396a(a)(10)(A)(ii)(I) and 1396d(a)(i)) or beginning January 1, 1988, defined as optionally eligible pregnant women and children pursuant to title XIX of the social security act (42 United States code section 1396a(a)(10)(A)(ii)(IX)).

* * *

A.R.S. § 36-2907(E)

* * *

E. Notwithstanding subsection A of this section, beginning October 1, 1987 the director shall provide medically necessary heart transplants and immunosuppressant medications for these transplants ordered on prescription by a physician licensed pursuant to title 32, chapter 13 or 17 to a person defined as eligible pursuant to § 36-2901, paragraph 4, subdivision (b) if federal financial participation is available under title XIX of the social security act for this service above the prepaid capitation amount for such person.

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42 U.S.C. § 1396a(a)(10)(A)(i)(I-VII)

* * *

(10) provide –

(A) For making medical assistance available, including at least the care and services listed in paragraphs (1) through (5), (17) and (21) of section 1396d(a) of this title, to –

(i) all individuals –

(I) who are receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI of this chapter or who are qualified severely impaired individuals (as defined in section 1396d(q) of this title), or part A or part E of subchapter IV of this chapter (including individuals eligible under this subchapter by reason of section 602(a)(37), 606(h) or 673(b) of this title, or considered by the State to be receiving such aid as authorized under section 682(e)(6) of this title).

(II) with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter or who are qualified severely impaired individuals (as defined in section 1396d(q) of this title).

(III) who are qualified pregnant women or children as defined in section 1396d(n) of this title,

(IV) who are described in subparagraph (A) or (B) of subsection (l)(1) of this section and whose family income does not exceed the minimum income level the State

42 U.S.C. § 1396a(a)(10)(A)(i)(I-VII)
(Continued)

is required to establish under subsection (l)(2)(A) of this section for such a family;

(V) who are qualified family members as defined in section 1396d(m)(1) of this title,

(VI) who are described in subparagraph (C) of subsection (l)(1) of this section and whose family income does not exceed the income level the State is required to establish under subsection (l)(2)(B) of this section for such a family, or

(VII) who are described in subparagraph (D) of subsection (l)(1) of this section and whose family income does not exceed the income level the State is required to establish under subsection (l)(2)(C) for such a family;

* * *

42 U.S.C. § 1396a(a)(10)(B)

(B) that the medical assistance made available to any individual described in subparagraph (A) –

(i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual, and

(ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in subparagraph (A);

* * *

42 C.F.R. § 440.240

§ 440.240 Comparability of services for groups.

Except as limited in § 440.250 –

(a) The plan must provide that the services available to any categorically needy recipient under the plan are not less in amount, duration, and scope than those services available to a medically needy recipient; and

(b) The plan must provide that the services available to any individual in the following groups are equal in amount, duration, and scope for all recipients within the group:

(1) The categorically needy.

(2) A covered medically needy group.